

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34255

PORTLAND & WESTERN RAILROAD, INC.–LEASE AND OPERATION EXEMPTION–  
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: December 12, 2002

On November 21, 2002, Portland & Western Railroad, Inc. (P&WR), a Class III carrier, filed a notice of its intent to file an exemption notice pursuant to 49 CFR 1150.41, to exempt from regulation under 49 U.S.C. 10902 its lease and operation of an approximately 76.75-mile line of railroad currently owned and operated by The Burlington Northern and Santa Fe Railway Company (BNSF), from milepost 64.70 located between Quinaby and Salem, OR, to the End of Track at milepost 141.45 near Eugene, OR.<sup>1</sup> As part of the transaction, P&WR states that it intends to grant what it calls “incidental” overhead trackage rights to BNSF over the rail line between Bush (milepost 68.6) and Albany (milepost 96.5), and to Central Oregon & Pacific Railroad, Inc. (CORP), between Albany (milepost 96.5) and Eugene (milepost 141.5).

On November 22, 2002, John D. Fitzgerald, on behalf of United Transportation Union-General Committee of Adjustment (UTU/GO-386), filed a motion for an order compelling P&WR to furnish the lease agreement(s) involved in the transaction. On December 11, 2002, UTU/GO-386 also filed a petition for stay of the exemption pending receipt of discovery materials, an adequate opportunity to fully address the issues, and an opportunity to submit a petition to reject the notice and/or to revoke the exemption.

In support of its motion to compel, UTU/GO-386 contends that P&WR’s notice of intent filed with the Board differs from the October 28, 2002 notice of intent directed to employees of BNSF. UTU/GO-386 specifically states that the scope of the incidental trackage rights is not mentioned in the notice to employees. UTU/GO-386 further states that many employees are involved, that the transaction embraces at least three rail carriers, and that the commercial terms of the transaction are important indicators as to the extent of the impact upon employees. It states that such impact is not confined to job loss, but may embrace other conditions of employment, including safety concerns. UTU/GO-386 requests that the Board compel production of the lease agreement(s) subject to any request for a protective order. In arguing for a stay, UTU/GO-386 contends that, unless stayed, the

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<sup>1</sup> On December 6, 2002, P&WR filed its notice of exemption.

transaction will become effective on December 13, 2002. UTU/GO-386 argues that such an early effective date would preclude labor from having an adequate opportunity to evaluate their future employment situation. P&WR replied in opposition to the motion to compel on December 12, 2002, but sought issuance of a protective order to protect confidential terms if the motion to compel is granted.

UTU/GO-386's motion to compel appears reasonable and will be granted, subject to a protective order. As far as the stay request is concerned, contrary to any statements P&WR may have made in its filings, the exemption cannot become effective until December 27, 2002, the end of the 60-day labor notice requirement of 49 CFR 1150.42(e). Accordingly, a stay is not necessary to avoid a December 13, 2002 effective date. Also, in light of this decision's requirement that P&WR provide UTU/GO-386 with the lease agreement(s), a stay on that ground is not required.

In addition, a serious question exists as to whether the trackage rights are incidental to the transaction as asserted by P&WR. The Board and its predecessor, the Interstate Commerce Commission, have determined that incidental trackage rights include the grant of trackage rights by the seller, or the assignment of trackage rights to operate over the line of a third party that occur at the time of the exempt acquisition or operation. Here, the lessee of the line (P&WR) seeks to grant trackage rights over a significant portion of the line back to the lessor (BNSF) and also to a third railroad (CORP). If the parties seek to enter into these trackage rights arrangements, they should submit separate filings to obtain authority or demonstrate why separate filings are not necessary.

It is ordered:

1. UTU/GO-386's motion to compel is granted, subject to a protective order to be issued in a separate decision.
2. The request for stay is denied as unnecessary at this time.
3. This decision is effective on the service date.

By the Board, Roger Nober, Chairman.

Vernon A. Williams  
Secretary